

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | | |
|------------------------|---|------------------------------|
| KRISTI M. DANIEL, |) | |
| |) | No. CV-10-00271-CI |
| Plaintiff, |) | |
| |) | ORDER GRANTING PLAINTIFF'S |
| v. |) | MOTION FOR SUMMARY JUDGMENT |
| |) | AND REMANDING FOR ADDITIONAL |
| MICHAEL J. ASTRUE, |) | PROCEEDINGS |
| Commissioner of Social |) | |
| Security, |) | |
| |) | |
| Defendant. |) | |

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 18.) Attorney Rebecca M. Coufal represents Kristi M. Daniel (Plaintiff); Special Assistant United States Attorney Willy M. Le represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on February 20, 2007. (Tr. 136, 144.) She alleged disability due to hepatitis C, fibromyalgia, arthritis, pneumonia, hiatal hernia, extreme fatigue and memory loss, with an alleged onset date of November 4, 2006. (Tr. 186.) Her claim was denied initially and on reconsideration. (Tr. 82-85, 86-90.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on June 23, 2009, before ALJ R.J. Chester. (Tr. 126.) Plaintiff, who was represented

1 by counsel, medical expert Steven Gerber, M.D., and vocational
2 expert Diane Kramer testified. (Tr. 33-72.) The ALJ denied
3 benefits on August 14, 2009, and the Appeals Council denied review.
4 (Tr. 11-22, 1-4.) The instant matter is before this court pursuant
5 to 42 U.S.C. § 405(g).

6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript
8 of proceedings and are briefly summarized here. Plaintiff was 56
9 years old when she applied for benefits and 59 years old at the time
10 of the hearing. (Tr. 136.) Plaintiff is college educated with a
11 bachelor of arts degree in counseling psychology and a masters
12 degree in applied behavioral science. (Tr. 48.) Plaintiff worked
13 as social worker from 1990 to 2005 and in customer service as a
14 telemarketer. (Tr. 175.) Plaintiff testified she is not married
15 and lives alone in an apartment with her service dog. (Tr. 46.)
16 Plaintiff testified she stopped working as a social worker in 2005
17 because she was getting sick frequently and not recovering from her
18 sickness. (Tr. 49.) Plaintiff's position as a telemarketer ended
19 when Plaintiff either quit or was discharged due to excessive
20 absence from her impairments. (Tr. 49, 250-53.) Plaintiff also
21 attempted a trial of work in 2007 that lasted for three weeks
22 because she ended up in the hospital. (Tr. 48, 51.) Plaintiff was
23 diagnosed with hepatitis C in 1996 and underwent interferon about
24 that time, but was unable to tolerate the treatment due to
25 neutropenia. (Tr. 568-72.) Plaintiff was once again treated with
26 interferon beginning in November 2007. (Tr. 850.) At the time of
27 the hearing, Plaintiff testified she had been receiving on and off
28 interferon treatment for the past 18 months. (Tr. 51.) Plaintiff's

1 records indicate her interferon treatment was suspended due to
2 Plaintiff's neutropenia. (Tr. 1088.)

3 Plaintiff alleges her interferon treatment for hepatitis C
4 prevents her from working now. (Tr. 51.) Plaintiff testified the
5 interferon treatment prevents her from working because of the side
6 effect of neutropenia and the resulting need to avoid exposure to
7 germs. (Tr. 52.) Plaintiff testified she had been undergoing
8 interferon treatment for 18 months at the time of the hearing. (Tr.
9 51.) Plaintiff states a caregiver helps with many household chores
10 including filling out forms and other paperwork, but that Plaintiff
11 usually does her own laundry. (Tr. 52, 55-56, 66.) Plaintiff
12 testified to several hospitalizations for bronchitis and pneumonia.
13 (Tr. 34-36, 44, 60, 62.) Plaintiff reports a walker was prescribed
14 by her neurologist for idiopathic polymorphic peripheral neuropathy.
15 (Tr. 44, 46.) Plaintiff testified to occasional use of a cane and
16 use of a service dog. (Tr. 46.) Plaintiff states she went from a
17 baseline weight of 134 in January 2008 to a low weight of 89 pounds
18 and finally regained some weight to be 102 pounds at the time of the
19 hearing. (52-53, 58-59.) Plaintiff is 4 foot 11 3/4 inches tall
20 and had shrunk two to three inches in the last two years likely due
21 to osteoporosis which was scheduled to be evaluated. (Tr. 52.)
22 Plaintiff also testified to cramping in her right hand after use.
23 (Tr. 57.) Plaintiff states she has trouble with pain and "a general
24 fatigue malaise" where she can't do anything, including focus which
25 can sometimes lead to staying in bed for five or six days. (Tr. 60-
26 61.) Plaintiff testified to difficulty in changing positions from
27 sitting to standing, particularly if she does so frequently. (Tr.
28 63.) Plaintiff states she could probably lift a carpenter's hammer

1 but would have a hard time holding on to it. (Tr. 63-64.)
2 Plaintiff also testified to difficulty remembering things. (Tr. 49,
3 50-51, 64.)

4 ADMINISTRATIVE DECISION

5 ALJ Chester found Plaintiff's date of last insured for DIB
6 purposes is December 31, 2011. (Tr. 13, Finding 1.) At step one,
7 the ALJ found Plaintiff had not engaged in substantial gainful
8 activity since November 4, 2006, the alleged onset date, other than
9 an unsuccessful three week trial of work in 2007. (*Id.*, Finding 2.)
10 At step two, he found Plaintiff had severe impairments of hepatitis
11 C; mild degenerative disc disease, lumbar spine; and fibromyalgia.
12 (*Id.*, Finding 3.) The ALJ concluded Plaintiff's mental impairments
13 of anxiety and depression were non-severe and her diagnosis for
14 chronic obstructive pulmonary disease was not supported by the
15 objective medical evidence. (Tr. 15.) The ALJ determined at step
16 three Plaintiff's medically determinable impairments, alone and in
17 combination, did not meet or medically equal one of the listed
18 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
19 (Listings). (Tr. 16.) The ALJ found Plaintiff's subjective
20 complaints regarding functional limitations were not fully credible.
21 (Tr. 18.) At step four, he determined Plaintiff could perform
22 sedentary work, but could only occasionally lift 10 pounds and
23 frequently lift less than 10 pounds. (Tr. 16, Finding 5.) The ALJ
24 also found Plaintiff could stand or walk at least 2 hours of an
25 eight-hour day and sit for about 6 hours of an eight-hour day.
26 (*Id.*) The ALJ also found Plaintiff was limited to only occasional
27 stair climbing and must avoid climbing ladders, ropes or scaffolds
28 and any concentrated exposure to fumes, odors, dusts or gases,

1 unprotected heights and moving machinery. (*Id.*) Relying on
2 vocational expert testimony, the ALJ determined Plaintiff could
3 return to her past relevant work as a social worker or customer
4 service representative because this work does not entail work-
5 related activities precluded by Plaintiff's RFC. (Tr. 21, Finding
6 6.) As a result, the ALJ concluded Plaintiff was not under a
7 disability from November 4, 2006, to the date of his decision. (Tr.
8 22, Finding 7.)

9 STANDARD OF REVIEW

10 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
11 court set out the standard of review:

12 A district court's order upholding the Commissioner's
13 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
14 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
15 Commissioner may be reversed only if it is not supported
16 by substantial evidence or if it is based on legal error.
17 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
18 Substantial evidence is defined as being more than a mere
19 scintilla, but less than a preponderance. *Id.* at 1098.
20 Put another way, substantial evidence is such relevant
21 evidence as a reasonable mind might accept as adequate to
22 support a conclusion. *Richardson v. Perales*, 402 U.S.
23 389, 401 (1971). If the evidence is susceptible to more
24 than one rational interpretation, the court may not
25 substitute its judgment for that of the Commissioner.
26 *Tackett*, 180 F.3d at 1098; *Morgan v. Commissioner of*
27 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

28 The ALJ is responsible for determining credibility,
resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 399. If evidence
supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
2 Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in
4 weighing the evidence and making the decision. *Browner v. Sec. of*
5 *Health and Human Serv.*, 839 F.2d 432, 433 (9th Cir. 1988). If there
6 is substantial evidence to support the administrative findings, or
7 if there is conflicting evidence that will support a finding of
8 either disability or non-disability, the finding of the Commissioner
9 is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir.
10 1987).

11 SEQUENTIAL EVALUATION PROCESS

12 Also in *Edlund*, 253 F.3d at 1156, the court set out the
13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are
15 "under a disability" are eligible to receive benefits. 42
16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
17 medically determinable physical or mental impairment"
18 which prevents one from engaging "in any substantial
19 gainful activity" and is expected to result in death or
20 last "for a continuous period of not less than 12 months."
21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
22 from "anatomical, physiological, or psychological
23 abnormalities which are demonstrable by medically
24 acceptable clinical and laboratory diagnostic techniques."
25 42 U.S.C. § 423(d)(3). The Act also provides that a
26 claimant will be eligible for benefits only if his
27 impairments "are of such severity that he is not only
28 unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy...." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

29 The Commissioner has established a five-step sequential
30 evaluation process for determining whether a person is disabled. 20
31 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
32 137, 140-42 (1987). In steps one through four, the burden of proof

1 rests upon the claimant to establish a prima facie case of
2 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
3 920, 921 (9th Cir. 1971). This burden is met once a claimant
4 establishes that a medically determinable physical or mental
5 impairment prevents her from engaging in her previous occupation.
6 20 C.F.R. §§ 404.1520(a), 416.920(a). The claimant "must present
7 'complete and detailed objective medical reports of her condition
8 from licensed medical professionals.'" *Meanel v. Apfel*, 172 F.3d
9 1111, 1113 (9th Cir. 1999).

10 If a claimant cannot do her past relevant work, the ALJ
11 proceeds to step five, and the burden shifts to the Commissioner to
12 show that (1) the claimant can make an adjustment to other work; and
13 (2) specific jobs exist in the national economy which claimant can
14 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
15 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

16 ISSUES

17 The question is whether the ALJ's decision is supported by
18 substantial evidence and free of legal error. Plaintiff argues the
19 ALJ erred when he: (1) improperly relied on the opinion of medical
20 expert Steven Gerber, M.D.; (2) found Plaintiff's chronic pain,
21 anxiety, depression and chronic obstructive pulmonary disease
22 ("COPD") were non-severe impairments; and (3) failed to find
23 Plaintiff's impairments equivalent to a Listing. (ECF No. 14.)
24 Defendant contends the ALJ's decision is supported by substantial
25 evidence and free of legal error. (ECF No. 19.)

26 DISCUSSION

27 A. Improper Reliance on Medical Expert Testimony

28 Plaintiff argues the ALJ erred by improperly relying on medical

1 consultant, Steven Gerber, M.D. (*Id.* at 13-15.) The analysis and
2 opinion of an expert selected by an ALJ may be helpful in his
3 adjudication, and the court should not second guess the ALJ's
4 resolution of conflicting medical testimony. *Andrews v. Shalala*, 53
5 F.3d 1035, 1041 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881
6 F.2d 747, 753 (9th Cir. 1989)). Unless the opinion of the medical
7 expert is supported by independent evidence, it cannot by itself
8 constitute substantial evidence. *Lester v. Chater*, 81 F.3d 821, 831
9 (9th Cir. 1996) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4
10 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir.
11 1984)); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).
12 As to the opinions expressed by the ALJ's expert, it is the
13 Government's responsibility to ensure the credibility, completeness,
14 and quality of the resulting report. *Gallant v. Heckler*, 753 F.2d
15 1450, 1454 (9th Cir. 1984).

16 Here, Dr. Gerber's testimony is not substantial evidence
17 because he did not review the Plaintiff's entire medical record. In
18 light of this unreviewed evidence, Dr. Gerber's testimony is not
19 supported by the record. Dr. Gerber testified he reviewed medical
20 evidence up to July 2008. (Tr. 38.) At the beginning of the
21 hearing on June 23, 2009, the ALJ noted the records he had received
22 (Tr. 324-869), and asked if the record was complete. (Tr. 33-34.)
23 Plaintiff's counsel stated Plaintiff's medical condition had
24 deteriorated after July 2008 and asked if the record could be left
25 open. (Tr. 34.) The ALJ agreed to leave the record open for 30
26 days. (Tr. 36.) On July 22, the ALJ informed Plaintiff's counsel
27 that he had received additional medical evidence. (Tr. 132-33.)
28 However, there is no indication Dr. Gerber reviewed these additional

1 records or if he was asked if his prior opinion remained unchanged
2 considering those records.

3 The post-hearing evidence consists of over 275 pages of medical
4 records, and covers the period from June 2008 to June 2009. These
5 records include documentation of Plaintiff's 2008 and 2009 hospital
6 visits (Tr. 873-88, 903-1001), prescription of Plaintiff's walker
7 and 3-pronged cane (Tr. 892), treatment records from Plaintiff's
8 neurologist, C. William Britt, M.D. (Tr. 891-902), treatment records
9 from Group Health (Tr. 1002-1054), and records from Plaintiff's
10 treatment of hepatitis C (Tr. 1055-1149). These records support
11 Plaintiff's allegations at the hearing that she had "recent
12 deterioration" which was not reflected in the evidence Dr. Gerber
13 did review. (Tr. 34.) Further, in response to questions about
14 whether Plaintiff's impairments are equivalent to a Listing, Dr.
15 Gerber stated Plaintiff had only one recent hospitalization for
16 pneumonia. (Tr. 40.) However, the record in its entirety reflects
17 Plaintiff was hospitalized six times with either bronchitis,
18 pneumonia or suspected pneumonia. (February 2007 at Tr. 325-77;
19 June 2007 at Tr. 503-28; October 2007 at Tr. 567-88; March 2009 at
20 Tr. 986-1001; April 2009 at Tr. 874-88; and June 2009 at Tr. 904-
21 23.) In light of this evidence, Dr. Gerber's hearing testimony is
22 not supported by the record and, therefore, is not substantial
23 evidence.

24 The new evidence is also inconsistent with Dr. Gerber's
25 testimony the record did not support Plaintiff's need for a walker
26 or other assistive device. During the hearing, the ALJ states, "The
27 claimant [was] using a walker when she came in this morning. Did
28 you see any support in the record for that?" (Tr. 39.) Dr. Gerber

1 responded, "No." (*Id.*) However, some time prior to March 2009, Dr.
2 Britt prescribed a "four-wheeled walker with a seat and a three-
3 pronged cane." (Tr. 892.)

4 In short, the post-hearing records received by the ALJ do not
5 support Dr. Gerber's testimony. A medical expert's testimony is not
6 substantial evidence unless it is supported by other medical
7 evidence in the record. *Tonapetyan*, 242 F.3d at 1148-49; *Lester*, 81
8 F.3d at 831. An ALJ's decision cannot stand unless supported by
9 substantial evidence. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th
10 Cir. 1999). Because there is not substantial evidence to support
11 the ALJ's decision, this matter must be remanded for new medical
12 expert¹ testimony based on the entire record reviewed by the ALJ.
13 While this error alone requires remand, Plaintiff alleged additional
14 errors. To aid the ALJ on remand, the court next addresses these
15 allegations.

16 **B. Step Two Findings**

17 Plaintiff contends the ALJ erred when he concluded Plaintiff's
18 anxiety, depression, chronic pain, and COPD were non-severe at step
19 two because substantial evidence does not support this finding.
20 (ECF No. 14 at 10-12.) At step two of the sequential evaluation,
21 the ALJ determines whether a claimant suffers from a "severe"
22 impairment, *i.e.*, one that significantly limits her physical or

23
24 ¹ The court also notes Dr. Gerber is certified in internal
25 medicine and cardiovascular disease. (Tr. 38.) Plaintiff's most
26 debilitating impairment seems to be hepatitis C and its side
27 effects. The ALJ should find a medical expert, that the record
28 reflects, is qualified to opine as to hepatitis C.

1 mental ability to do basic work activities. 20 C.F.R. §§
2 404.1520(c), 416.920(c). To satisfy step two's requirement of a
3 severe impairment, the claimant must prove the existence of a
4 physical or mental impairment by providing medical evidence
5 consisting of signs, symptoms, and laboratory findings; the
6 claimant's own statement of symptoms alone will not suffice. 20
7 C.F.R. §§ 404.1508, 416.908. The fact that a medically determinable
8 condition exists does not automatically mean the symptoms are
9 "severe" as defined by the Social Security regulations. See, e.g.,
10 *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001). "An
11 impairment or combination of impairments can be found 'not severe
12 only if the evidence establishes a slight abnormality that has no
13 more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting *Yuckert*
14 *v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)).

16 **1. Mental Impairments**

17 Plaintiff argues the ALJ erred in rejecting her anxiety and
18 depression as severe impairments. (ECF No. 14 at 11.) Mental
19 impairments are generally considered not severe if the degree of
20 limitation in the three functional areas of activities of daily
21 living, social functioning, and concentration, persistence or pace
22 is rated as "none" or "mild" and there have been no episodes of
23 decompensation. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1). The
24 ALJ determined Plaintiff's limitations in the three functional areas
25 were mild and Plaintiff had no episodes of decompensation. (Tr.
26 15.) The ALJ's finding is supported by substantial evidence.

27 For example, in February 2008, Dr. Cohen noted Plaintiff was
28 not having significant depression even with the interferon

1 treatment. (Tr. 1063.) In July 2008, Dr. Cohen noted Plaintiff was
2 feeling less depressed off antidepressants than she was when on
3 them. (Tr. 1088.)

4 As to Plaintiff's anxiety, although the record indicates
5 Plaintiff was no longer taking antidepressants, she was taking
6 Klonopin² for her anxiety disorder. (Tr. 871.) However, Plaintiff's
7 treatment records do not show Plaintiff has complaints about anxiety
8 beyond getting refills for her medication. (Tr. 804-05.) Because
9 impairments which are well-controlled with medication may be
10 properly found non-severe, the ALJ did not err. *Warre v. Comm. of*
11 *the Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (stating
12 "[i]mpairments that can be controlled effectively with medication
13 are not disabling for the purpose of determining eligibility for SSI
14 benefits"). Since substantial evidence supports the ALJ's finding
15 that Plaintiff's mental disorders are not severe, the ALJ has not
16 erred.

17 2. Chronic Pain

18 Plaintiff contends the ALJ erred in rejecting her chronic pain
19 as a severe impairment at step two. (ECF No. 14 at 11.) However,
20 Plaintiff's argument is unavailing because the ALJ found Plaintiff's
21 fibromyalgia to be a severe impairment. (Tr. 13.) Fibromyalgia
22 includes chronic pain as a symptom.³ Therefore, the court reasonably
23

24 ² Klonopin is the brand name of the generic clonazepam which is
25 a benzodiazepine "used to relieve panic attacks,"
26 www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000635.

27 ³ Symptoms of fibromyalgia include chronic muscle pain, spasms
28 or tightness, limb weakness, leg cramps, fatigue and decreased

1 may infer that ALJ's step two finding of fibromyalgia as severe
2 subsumes a finding of severe chronic pain. *Burch v. Barnhart*, 400
3 F.3d 676, 679, 682 (9th Cir. 2005).

4 3. COPD

5 Plaintiff also challenged the ALJ's finding that Plaintiff's
6 COPD is not severe. (ECF No. 14 at 11.) The ALJ relied on Dr.
7 Gerber's testimony to make this finding. (Tr. 15.) Dr. Gerber
8 opined Plaintiff did not have COPD because she has had normal lung
9 function tests. (Tr. 15, 19, 39, referencing Tr. 796.) However,
10 the record also indicates Plaintiff's primary care physician Dr.
11 Sayres diagnosed COPD, in spite of her pulmonary function test.
12 (Tr. 289, 1051.) As stated above, numerous medical records were
13 received post-hearing which the medical expert, Dr. Gerber, did not
14 review. Because these records show diagnosis of COPD, even with
15 what Dr. Gerber found to be normal pulmonary function, and include
16 hospitalizations for pneumonia and bronchitis described as
17 exacerbating Plaintiff's COPD (Tr. 594), there is not substantial
18 evidence to support the ALJ's determination Plaintiff's COPD is non-
19 severe.

20 Further, even if the ALJ was correct in determining Plaintiff
21 either did not have COPD or that her COPD was non-severe, as
22 Defendant points out, an error at step two is only harmless when the
23 ALJ continues to consider all of Plaintiff's impairments in
24 combination throughout the sequential evaluation process. *Burch*,
25 400 F.3d at 676. On *de novo* review, the court notes the ALJ failed

26 _____
27 energy, among other complaints. See [www.webmd.com/fibromyalgia/](http://www.webmd.com/fibromyalgia/understanding-fibromyalgia-symptoms)
28 understanding-fibromyalgia-symptoms.

1 to consider symptoms from all of Plaintiff's diagnosed impairments,
2 including COPD, in combination throughout the sequential evaluation
3 process. Therefore the errors alleged here, if any, cannot be
4 considered harmless. *Id.* (finding errors harmless because ALJ
5 considered claimant's obesity at steps three and five). The failure
6 to consider Plaintiff's impairments in combination is particularly
7 prejudicial in the ALJ's decision at step three.

8 **C. Step Three - Equivalence**

9 Plaintiff argues the ALJ erred by not finding Plaintiff's
10 impairments met or equaled a Listed Impairment in 20 C.F.R. Pt. 404,
11 Subpt. P, App. 1. (ECF No. 14 at 12-15.) The Commissioner has
12 promulgated a "'Listing of Impairments' . . . considered so severe
13 that they are irrebuttably presumed disabling, without any specific
14 finding as to the claimant's ability to perform [her] past relevant
15 work or any other jobs." *Lester*, 81 F.3d 821 at 828. A claimant is
16 "conclusively disabled if [his] condition *either* meets or equals a
17 listed impairment." *Id.* (citing 20 C.F.R. § 404.1520(d)). Medical
18 equivalence will be found "if findings related to your impairments
19 are at least of equal medical significance to those of a listed
20 impairment." 20 C.F.R. §§ 404.1526(b)(3), 416.926(b)(3).
21 Equivalence is determined on the basis of a comparison between the
22 "symptoms, signs and laboratory findings" about the claimant's
23 impairment as evidenced by the medical records "with the medical
24 criteria shown with the listed impairment." 20 C.F.R. §§
25 404.1529(d)(3), 416.929(d)(3).

26 If a claimant has more than one impairment, the Commissioner
27 must determine "whether the combination of impairments is medically
28 equal to any listed impairment." 20 C.F.R. §§ 404.1526(b)(3),

1 416.926(b)(3). The claimant's symptoms "must be considered in
2 combination and must not be fragmentized in evaluating their
3 effects." *Lester*, 81 F.3d at 829 (citations omitted). The failure
4 to do so is legal error requiring remand. *Id.* at 830.

5 In the decision, the ALJ must make specific findings about
6 equivalency only when the claimant presents a reasonable theory as
7 to how her impairments meet or equal the Listings. *Lewis v. Apfel*,
8 236 F.3d 503, 513 (9th Cir. 2001) (finding no error when ALJ did not
9 make detailed findings regarding equivalency because claimant "has
10 offered no theory, plausible or otherwise, as to how his seizure
11 disorder and mental retardation combined to equal a listed
12 impairment"). If the Plaintiff presents a theory of equivalency,
13 "the ALJ must explain adequately his evaluation of . . . the
14 combined effects of the impairments." *Marcia v. Sullivan*, 900 F.2d
15 172, 176 (9th Cir. 1990).

16 In explanation of his step three findings, the ALJ states:

17 The claimant does not have an impairment or
18 combination of impairments that meets or medically equals
one of the listed impairments in 20 C.F.R. Part 404,
Subpart P, Appendix 1. . . .

19 The medical evidence indicates that the claimant has:
20 hepatitis C; mild degenerative disc disease, lumbar spine;
21 and fibromyalgia, impairments that are severe within the
22 meaning of the Regulations but not severe enough to meet
23 or medically equal one of the impairments listed in
24 Appendix 1, Subpart P, Regulations No. 4. Furthermore, no
25 treating or examining physician has mentioned findings
26 that meet or are equivalent in severity to the criteria of
27 any listed impairment, nor does the evidence show medical
28 signs or findings that are the same or equivalent to those
of any listed impairment, specifically sections 1.00,
Musculoskeletal System disorders, and 5.00 Digestive
System disorders.

(Tr. 16.)

The ALJ's statement above lacks sufficient detail to determine

1 why Plaintiff's combination of impairments do not meet or equal a
2 Listing. The ALJ found Plaintiff had several severe impairments
3 including hepatitis C, mild degenerative disc disease and
4 fibromyalgia. In addition, the ALJ also found Plaintiff had non-
5 severe anxiety and depression, chronic pain and COPD. Further, the
6 record shows many of Plaintiff's severe and non-severe impairments
7 include side effects from treatment (like neutropenia from use of
8 interferon to treat hepatitis C-see Listing 7.15) or symptoms of the
9 disease (like weight loss similar to Listing 5.06 or 5.08). In
10 addition, the record indicates Plaintiff takes a significant amount
11 of pain medication to treat her pain from neutropenia, fibromyalgia,
12 and idiopathic polymorphic peripheral neuropathy,⁴ including morphine

13
14 ⁴ "Peripheral neuropathy is disorder of nerve(s) apart from the
15 brain and spinal cord. Patients with peripheral neuropathy may have
16 tingling, numbness, unusual sensations, weakness, or burning pain."
17 www.medicinet.com/peripheralneuropathy/article.htm#lwhatis. While
18 the ALJ states this condition is associated with Plaintiff's
19 hepatitis C and is "dramatically better on Neurontin" (Tr. 19,
20 referencing Tr. 1139), this finding is not supported by the record.

21 For example, Dr. Cohen notes:

22 [Her peripheral neuropathy] was present prior to the
23 presentation of interferon, and [treating providers] do
24 not feel it is related to her hepatitis C either. She is
25 cryoglobulin-negative. They feel it is an idiopathic
26 peripheral neuropathy, which seems fairly progressive, as
it antedated the presence of interferon and would be
clearly unrelated to that. Although they feel it is not
hep C-related, if it were, then she is on appropriate
management, as well.

27 (Tr. 1129.) The ALJ offers no reason for rejecting Plaintiff's
28 treating physician's conclusion as to the peripheral neuropathy.

1 and oxycodone. There is no indication the ALJ considered these
2 factors in determining if Plaintiff's impairments in combination
3 meet or equal a listed impairment.

4 At the hearing, Plaintiff's attorney cross-examined Dr. Gerber
5 as to Plaintiff's bouts of pneumonia, referring to the Listings.
6 (Tr. 41-42.) In a letter to the ALJ after the hearing, Plaintiff's
7 first attorney, Larry Weiser, offered a number of theories to
8 establish equivalency to a Listed impairment. (Tr. 314-320.) These
9 same theories of equivalency were noted in a letter brief to the
10 Appeals Council. (Tr. 321-23.) Unlike the claimant in *Lewis*,
11 Plaintiff argued for a claim of disability based on the Listings.

12 As discussed above, the expert testimony of Dr. Gerber is not
13

14 See *Andrews*, 53 F.3d at 1043 (finding a contradicted medical opinion
15 can only be rejected for "specific and legitimate reasons" that are
16 supported by substantial evidence in the record). In addition, the
17 ALJ states Plaintiff's neurological testing continues to be normal.
18 (Tr. 19, referencing Tr. 899-902.) However, Dr. Britt found:

19 1. Right ulnar neuropathy with conduction delay across
20 the elbow.

21 2. Normal digital sensory action potentials of the right
22 median nerve.

23 3. Low amplitude of the compound muscle action potential
24 of the right peroneal nerve.

25 4. Absent sensory action potentials of the right sural
26 and superficial peroneal nerves.

27 These latter two findings are most compatible with a
28 peripheral polyneuropathy of axonal origin.

(Tr. 894.) The ALJ's failure to address this evidence is error and
must be corrected on remand.

1 substantial evidence, and the ALJ must use the expertise of a
2 medical expert if he determines a claimant may have an impairment
3 which meets or equals the Listings. Social Security Regulation
4 ("SSR") 96-6p.⁵ (while an ALJ is not bound by the opinion of a
5 program physician as to whether an impairment is equivalent in
6 severity to a Listed impairment, "longstanding policy requires that
7 the judgment of a physician . . . designated by the Commissioner on
8 the issue of equivalence on the evidence before the ALJ . . . must
9 be received into the record as expert opinion evidence and given
10 appropriate weight"). Because the ALJ fails to specifically discuss
11 how Plaintiff does not meet or equal the Listings, fails to discuss
12 Plaintiff's impairments in combination and has no adequate medical
13 expert testimony to support the step 3 determination, the ALJ's
14 decision must be reversed.

15 CONCLUSION

16 The errors alleged require reversal as discussed above.
17 However, the court makes no opinion as to whether Plaintiff should
18 be found disabled. While this court may remand for an immediate
19 award of benefits, this should be done when "the record has been
20 developed fully and further administrative proceedings would serve

21
22 ⁵ Social Security Rulings are issued to clarify the
23 Commissioner's regulations and policy. They are not published in
24 the federal register and do not have the force of law. However,
25 under the case law, deference is to be given to the Commissioner's
26 interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d
27 1002, 1005 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341,
28 346 n.3 (9th Cir. 1991).

1 no useful purpose." *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir.
2 2004) (*citing Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996);
3 *Varney v. Sec. of Health and Human Serv.*, 859 F.2d 1396, 1399 (9th
4 Cir. 1988). As the ALJ's decision (1) relied on medical expert
5 testimony that is not based on the entire record before the ALJ, and
6 (2) fails to adequately consider all of Plaintiff's impairments in
7 combination throughout the sequential evaluation, remand for
8 additional proceedings is warranted. *McAllister v. Sullivan*, 888
9 F.2d 599 (9th Cir. 1989). On remand, the ALJ is directed to ensure
10 the expert has reviewed all of Plaintiff's evidence, to take full
11 and detailed expert testimony regarding equivalency, and to complete
12 a new sequential evaluation as the current one is tainted by errors.

13 In addition, Plaintiff alleges numerous non-exertional
14 limitations such as loss of memory and difficulty with persistence
15 and pace. The consultative examination with Jay M. Toews, Ed.D.,
16 recommends further testing for both physical capacity and mental
17 impairment determination. (Tr. 741.) The ALJ should ascertain the
18 extent of Plaintiff's physical capacity and non-exertional
19 limitations to make an appropriate RFC determination on remand.
20 Finally, throughout the new sequential evaluation, the ALJ must
21 fully consider Plaintiff's impairments in combination and not
22 fragmentize the analysis according to a particular impairment. See
23 *Lester*, 81 F.3d at 829. Accordingly,

24 **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
26 **GRANTED** and the matter is remanded to the Commissioner for
27 additional proceedings pursuant to 42 U.S.C. § 405(g) and consistent
28 with this decision.

3. Application for attorney's fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

DATED December 12, 2011.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE